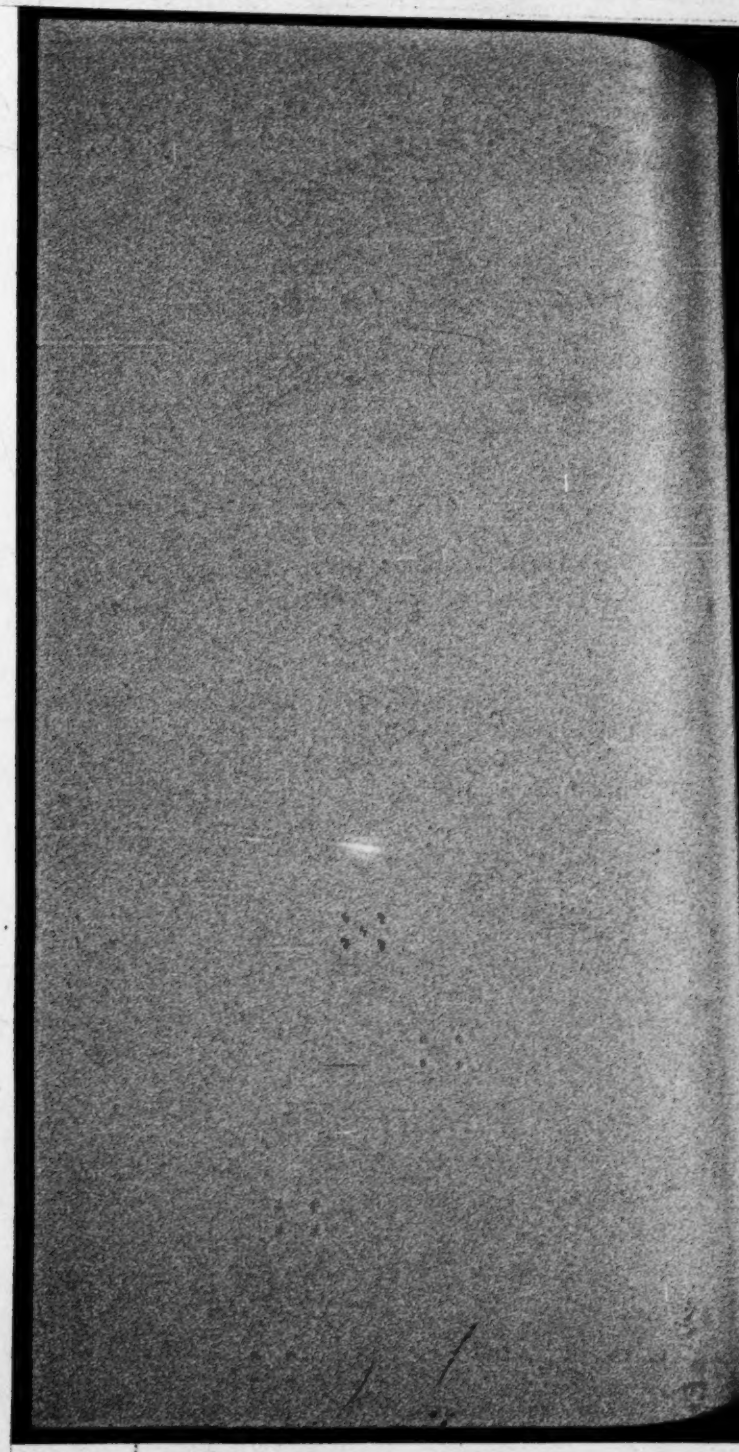

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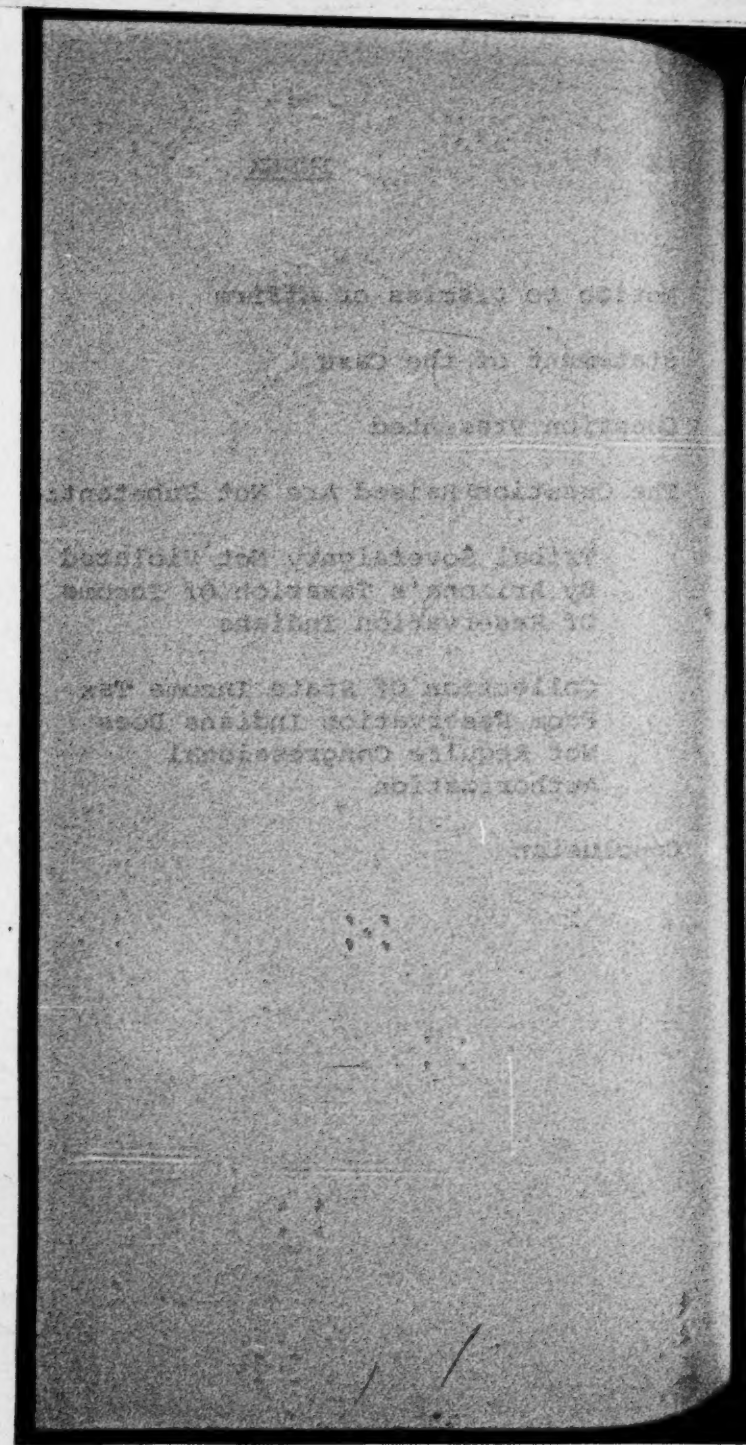

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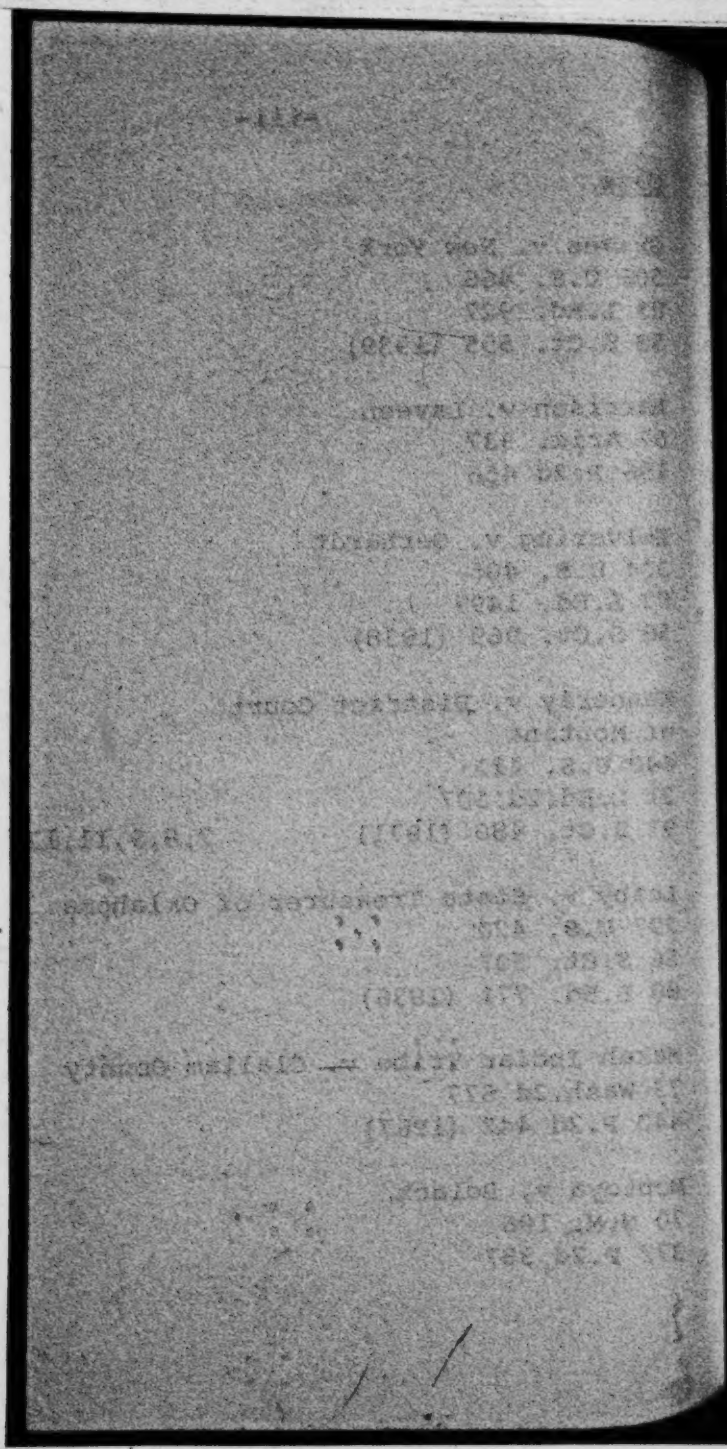

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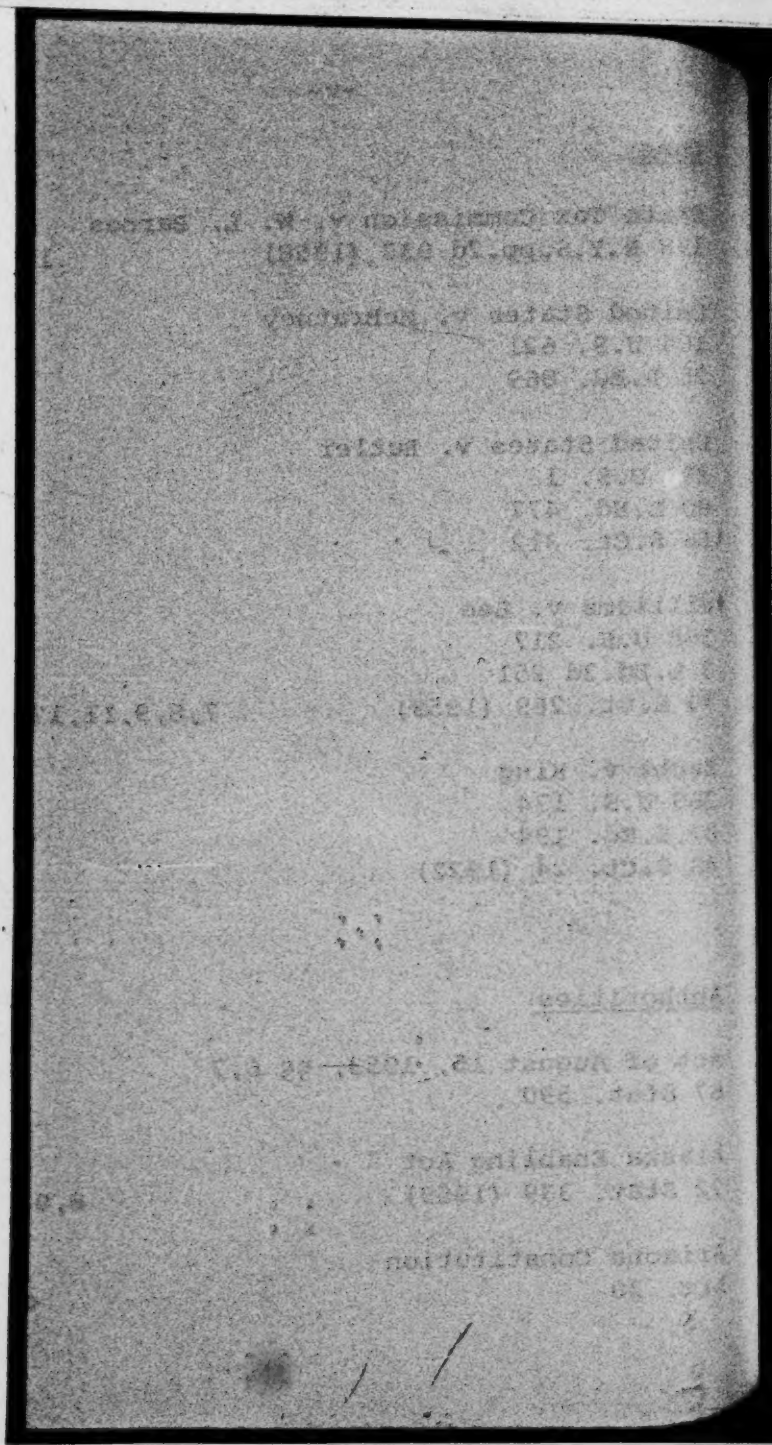

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-834

ROSALIND McCLANAHAN,
on behalf of herself and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

On Appeal from the
Supreme Court of the State of Arizona

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal because the issue presented is whether the State of Arizona, which imposes an income tax upon the entire net income of every resident of the State, may impose such

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-5139

DECLARATION,

Petitioner,

v.

Respondent.

On Appeal from the
Supreme Court of the State of Arizona

MOTION TO DISMISS THE APPEAL

Appellee moves the Court to dismiss
this appeal because the issue presented
whether the State of Arizona, using law
an income tax upon the wealth not income
every resident of the state, may impose

tax on members of the Navajo Indian Tribe residing and earning income within the boundaries of the Navajo Indian Reservation in the State of Arizona. The questions involved in this issue have already been decided by this Court and this case does not, therefore, present a substantial federal question.

STATEMENT OF THE CASE

Rosalind McClanahan, appellant herein is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the 1967 calendar year, appellant resided within the exterior boundaries of the Navajo Indian Reservation, on that portion of the Reservation which is within the State of Arizona. Appellant's income during the 1967 calendar year was wholly derived from sources within the confines of

[illegible] economic welfare of the Navajo Indian by [illegible] spending and earning income within the [illegible] denial of the Navajo Indian beneficiaries [illegible] the State of Arizona. The questions [illegible] involved in this cause have already been [illegible] cided by this Court and this case does [illegible] therefore, present a substantial federal [illegible] question.

STATEMENT OF THE CASE

[illegible] Navajo Nation, appellant here [illegible] duly citizens of the United States and [illegible] enrolled members of the Navajo Tribe of [illegible] dians. During the 1947 calendar year, [illegible] lant resided within the exterior boundary [illegible] of the Navajo Indian Reservation, or the [illegible] sion of the Reservation which is within [illegible] the State of Arizona. Appellant's income [illegible] during the 1947 calendar year was wholly [illegible] rived from sources within the exterior [illegible]

the Navajo Indian Reservation. The total amount of tax withheld from appellant's income pursuant to Ariz. Rev. Stat. Ann. § 43-188(f) amounted to $16.20. On April 1, 1968, appellant filed an Arizona State Individual Income Tax Return.

Thereafter, appellant instituted a class action for refund in the Superior Court of Arizona in and for Apache County on June 17, 1969, pursuant to Ariz. Rev. Stat. Ann. § 43-186(d). Appellee moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. It was the appellee's position that the state income tax was applicable unless its application would interfere with reservation self-government or impair a right granted or reserved by federal law, and that the Arizona Enabling Act,

the Navajo Indian Reservation. The ta
account of tax withheld from appellant'
case pursuant to Ariz. Rev. Stat. Ann.
(1956) amounted to $16,20. On April 1
1959, appellant filed an Arizona state
individual income tax return.

Thereafter, appellant initiated a
state action for refund in the Superior
Court of Arizona in and for Apache Coun
on June 17, 1959, pursuant to Ariz. Rev
Stat. Ann. § 43-180(d). Appellee moved
dismiss on the ground that the complai
failed to state a claim upon which relie
could be granted. It was the appellee's
position that the state income tax was
valid unless its application would inter
fere with reservation self-government or
impair a right granted or reserved by fe
eral law, and that the Arizona Enabling

36 Stat. 557, 570 (1910), the Arizona Constitution, Article 20, and the Treaty of 1868 between the United States and the Navajo Tribe 15 Stat. 667, did not contain any provisions that would prohibit the imposition of the Arizona state income tax on the income of Indians residing on the Navajo Reservation within the boundaries of the State of Arizona.

The appellant contended that (1) absent an act of Congress expressly conferring such power, the State of Arizona has no power to tax the income of the appellant; (2) Arizona has no power to tax the income of the appellant because the exercise of such a power would interfere with powers essential to the self-government of the Navajo Tribe; (3) the Arizona Enabling Act and Article 20 of the Arizona Constitution preclude the State of Arizona from applying its income tax to the

income of reservation Indians.

The Superior Court dismissed appellant's complaint on January 12, 1970, holding that the State of Arizona did not require express congressional authority to tax the appellant, and that the income tax imposed and collected by appellee did not interfere with tribal self-government. The appellant then noticed an appeal to the Court of Appeals of the State of Arizona. The Court of Appeals affirmed the Superior Court's dismissal of the complaint on April 28, 1971. The Court of Appeals based its decision on its conclusions that imposition of the income tax did not infringe upon the right of self-government of the Navajo Tribe and that the Arizona Enabling Act, Section 20, 36 Stat. 369, and the Arizona Constitution, Article 20, did not bar im-

[illegible] of reservation Indians."

The Superior Court dismissed appe[llant's] complaint on January 12, 1970, [holding] that the State of Arizona did not [possess] constructional authority to tax [appellant], and that the income tax imp[osed] and collected by appellee did not unde[rmine] certain tribal self-government. The stipu[lation] then recited an appeal to the Court of [Appeals] of the State of Arizona. The Co[urt] of Appeals affirmed the Superior Court's [dismissal] of the complaint on April 28, [1971]. The Court of Appeals based its d[ecision] on its conclusions that imposition [of] the income tax did not interfere upon [the] right of self-government of the Navajo [Tribe] and that the existing Enabling Act, [Section] 20, 36 Stat. 568, and the Arizo[na] Constitution, Article XX, did not [illegible]

position of the Arizona income tax. On May 11, 1971, appellant moved for a rehearing, which was denied on June 8, 1971. Appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and said petition was denied on September 21, 1971. Appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record on October 4, 1971

QUESTION PRESENTED

The basic question presented by this appeal is: May a state having an income tax statute imposing a net income tax upon the entire net income of every resident of the state impose such a tax upon income earned on an Indian reservation within the

[illegible] Arizona Income-Tax [illegible]
[illegible] 11, 1971, appellant moved for a re[illegible]
[illegible]ing, which was denied on June 8, 1971.
[illegible]pellant then filed a petition for revi[illegible]
[illegible] the Supreme Court of Arizona on June 2[illegible]
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[illegible]diction of Appeal to the Supreme Court
[illegible]ited States in the Superior Court, p[illegible]
[illegible]court pursuant of the record on Octobe[illegible]
[illegible]1971.

QUESTION PRESENTED

The basic question presented by th[illegible]
[illegible]ppeal is: May a state having an income
[illegible]tax statute imposing a net income tax u[illegible]
[illegible]the entire net income of every resident
[illegible]the state impose such a tax upon income
[illegible]rned on an Indian reservation within

state by members of an Indian tribe residing in the state on that Indian reservation?

THE QUESTIONS RAISED ARE NOT SUBSTANTIAL

TRIBAL SOVEREIGNTY NOT VIOLATED BY ARIZONA'S TAXATION OF INCOME OF RESERVATION INDIANS

The general rule for determining the validity of state action in respect to Indian reservations is:

> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269; Kennerly v. District Court of Montana, 440 U.S. 423, 27 L.Ed.2d 507, 91 S.Ct. 480.

State action in respect to Indian reservations was successfully challenged in the Williams and Kennerly cases, but those cases are distinguishable from this case because

both of those cases involved governing acts of Congress. The Act of August 15, 1953, Sections 6 and 7, 67 Stat. 590, and the Civil Rights Act of 1968, 25 U.S. Code 1321-1326, both give the consent of the United States to any state not having jurisdiction over civil causes of action to assume such jurisdiction. From the language utilized in these statutes as well as Senate Report 699, dated July 29, 1953, 1953 U.S. Code Congressional and Administrative Service 2412, it is apparent that the purpose of this legislation was to give the consent of the United States to the removal of any state enabling act impediments to assumption of state jurisdiction on Indian reservations.

In the Williams and Kennerly cases, supra, the jurisdiction referred to is civil causes of action. The State of Alaska

[illegible] of those cases involved governing
[illegible] Congress, the Act of August 1st, 19
[illegible] sections 6 and 7, 67 Stat. 590, and the
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[illegible] in these statutes as well as Senate Rep
[illegible] dated July 20, 1953, U.S. Code
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In the Williams and Kennerly cases,
[illegible] cause, the jurisdiction referred to in t
[illegible] clauses of section. The State of Alaska

Enabling Act contained a disclaimer provision and an absolute jurisdiction provision like that of Section 20 of the Arizona Enabling Act, 36 U.S. Stat. 557. In construing those provisions in Organized Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562, the Court pointed out that the disclaimer of right and title by the state was a disclaimer of proprietary rather than governmental interest and that the purpose of the absolute jurisdiction and control provision was to avoid the possibility that under United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869, federal criminal jurisdiction over Indian reservations might be extinguished by statehood. Thus, the term "jurisdiction" has been used in both the Court decisions such as the Williams and Conner ly cases, supra, and by Congress to

[illegible] Act contained a disclaimer pr
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[illegible]be extinguished by statehood. Thus, the
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[illegible]boundary cases, supra, and by Congress t

mean jurisdiction in the sense in which it is employed to describe the scope of power of courts to act rather in the broader sense of the general scope of governmental powers. Under the construction that has been placed on State Enabling Acts, neither those acts nor the legislation to remove the impediments created by the State Enabling Acts bar application of a state income tax to income of Indian residents of an Indian reservation. Therefore, no governing act of Congress is involved in this case.

For many years state governments have proceeded on the basis of the assumption that the states do have a certain amount of jurisdiction in respect to Indian reservations. Reliance on this assumption is indicated by the following decisions: Indians have the right to vote, Harrison v. Laveen,

67 Ariz. 337, 196 P.2d 456; the right to serve on a jury, Denison v. State, 34 Ariz. 144, 268 P. 617; the right to a hunting and fishing license so that he may hunt and fish off the Indian reservation, Begay v. Sawtelle, 53 Ariz. 304, 88 P.2d 999; and the right to the issuance of a contract carrier permit by the Corporation Commission, Bradley v. Arizona Corporation Commission, 60 Ariz. 508, 141 P.2d 524. In State of Arizona v. Hobby, 221 F.2d 498, the Court upheld the refusal of a federal administrator to approve Arizona's welfare program which excluded the reservation Indians. Courts have repeatedly held that Indians are citizens of the state; that they are entitled to the services and benefits available to others and the denial of these is a denial of equal protection. By writs of mandamus

and other appropriate measures, the courts have enforced these rights of Indian citizens.

In its opinion in this case, the Court of Appeals pointed out that counsel for the appellant had conceded in oral argument that tax monies of the State of Arizona were being expended for education and welfare within the confines of the Navajo Reservation and the Navajo Indians were the beneficiaries of these expenditures.

The Court decisions cited in the preceding paragraph and the action of the State of Arizona in expending its funds on the Indian reservation indicate that the State does have a certain amount of general governmental jurisdiction on the reservation. The test that the Court utilized in Williams v. Lee, and reaffirmed in Kennerly, supra, indicates that the states have a

certain amount of jurisdiction on Indian reservations. The appellant urges that in the absence of congressional authorization, the states cannot act. That position is clearly in conflict with the test evolved in Williams v. Lee and Kennerly, supra. If congressional authorization was the test, then it would have been unnecessary for the court to formulate the infringement of self-government portion of the rule in the Williams case.

Equality of privilege and equality of obligation should be inseparable associates. Oklahoma Tax Commission v. United States, 319 U.S. 598, 87 L.Ed. 1612, 1620. Since the members of the Navajo Tribe receive many benefits of state government, it is certainly just that they bear a few burdens of state government that do not infringe upon the right of self-government of the Navajo Tribe.

Cases involving the immunity of government instrumentalities from taxation are based on the same rationale as the infringement of the right of self-government test of Williams v. Lee, supra. In both of these cases the concern is whether there has been interference with the right of self-government. This problem was considered in Oklahoma Tax Commission v. Texas Company, 336 U.S. 342, 93 L.Ed. 721 (1949), and the Court concluded:

> So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. * * * the power to tax should not be crippled by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental in-

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ment. This problem was considered in
Indiana Tax Commission v. Texas Company
(U.S. 1942, 87 L.Ed. 751 (1943), and
court concluded:

"In fact as subtle modifications may
create tax burdens upon the instrumentality
here into the field of the activities
of the government, there is but a
short boundary of the opportunities
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ing the constitutional exemption
from taxation to every subject
matter that will within the general
application of nondiscrimination
laws, and where no direct burden
is laid upon the governmental in-

> strumentality and there is only remote, if any, influence upon the exercise of the functions of the government. * * * immunity from nondiscriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect.

A situation where the direct effect of a tax is on the government is suggested by Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941). If the legal incidence of the tax was on the Navajo Tribe such a tax would infringe on the Navajo right of self-government. Of course, it has not been shown that the legal incidence of this tax is on the Navajo Tribe.

A tax upon a Navajo Indian residing on the Navajo Reservation in respect to income earned on the reservation does not have any

direct effect on the Navajo right of self-government just as a United States tax on Arizona citizens does not impair the sovereignty of the State of Arizona, nor does an Arizona state income tax impair the sovereignty of the United States. In Helvering v. Gerhardt, 304 U.S. 405, 82 L.Ed. 1497, 58 S.Ct. 969 (1938), the power of the federal government to impose an income tax on employees of the Port Authority of New York was upheld and in Graves v. New York, 306 U.S. 466, 83 L.Ed. 927, 59 S.Ct. 595 (1939), the power of a state to levy an income tax on the salary of federal employees was upheld.

Indians are not exempt from taxation because of their status as Indians. Choteau v. Burnet, 283 U.S. 691, 75 L.Ed. 1353, 51 S.Ct. 598. The imposition of income taxes

upon Indians by states has been upheld in Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S.Ct. 507, 80 L.Ed. 771; State Tax Commission v. W. L. Barnes, 178 N.Y. Supp.2d 932 (1958); Powless v. State Tax Commission, 253 N.Y.Supp.2d 438 (1964); and Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002. These decisions are a further indication that the application of state income taxes to Indians residing on Indian reservations does not infringe upon the Indian right of self-government. In the Ghahate case, the parties even stipulated that the imposition of the income tax did not infringe upon the Indian right of self-government. Looking at the historical experience of our federal system of government where income taxes have been imposed by both state and federal governments at the

same time, on the same citizens, there is nothing in this picture to indicate that the Arizona income tax will in substance, rather than in theory, infringe on the Navajo right of self-government which is protected by the Treaty of 1868, 15 Stat. 667.

Various state court cases cited by the appellant in support of her position such as Sohol v. Clark, ___ Wash. ___, 479 P.2d 925 (1971); Pourier v. Board of Commissioners, 83 S.D. 235, 157 N.W.2d 532 (1969); Makah Indian Tribe v. Clallam County, 73 Wash.2d 677, 440 P.2d 442 (1967), are not in point. These cases all involved the assessment of personal property taxes on personal property that was furnished to Indians by the United States for governmental purposes or property which was used in connection with trust property or property which was acquired with

the proceeds of the sale of trust lands. In each of these cases the effect of imposing the property tax was to tax an instrumentality of the United States Government. The appellant has not claimed that the income which the State seeks to tax in this case is exempt from tax because it is income from the sale of trust property or income from trust property.

COLLECTION OF STATE INCOME TAX FROM RESERVATION INDIANS DOES NOT REQUIRE CONGRESSIONAL AUTHORIZATION

Amendment X of the United States Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The federal union has only the powers expressly conferred on it and those reasonably

implied from powers granted, while each state has all governmental powers except such as the people, by the constitution, have conferred on the United States denied to the state, or reserved to themselves. United States v. Butler, 297 U.S. 1, 80 L.Ed. 477, 56 S.Ct. 312.

The only provision of the Constitution expressly conferring power upon Congress in regard to Indian tribes is Article 1, Sec. 8, Clause 3, which gives Congress the power to regulate commerce with Indian tribes. There is no provision in the United States Constitution which prohibits states from exercising jurisdiction in levying taxes in respect to Indian reservations. In Silas Mason Company v. Tax Commission of Washington, 302 U.S. 186, 82 L.Ed. 187, 203 (1937), the Court disposed of the argument of exclusive

jurisdiction barring imposition of a state tax on an Indian reservation with its holding that although title to the lands had always been in the United States, exclusive legislative authority could be obtained by the United States only through cession by the state. Accordingly, the state had jurisdiction to impose its tax.

In view of the decision in Organized Village of Kake v. Egan, supra, construing the disclaimer and absolute jurisdiction and control provisions of the Alaska Enabling Act, it is clear that Arizona did not surrender jurisdiction for general governmental purposes as contended by the appellant here and that the State, therefore, has the authority to impose this income tax upon all its citizens. The courts have rejected the argument that the federal government

has exclusive authority in respect to Indian reservations. Acosta v. San Diego County, 272 P.2d 92; Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387. It has been held that United States approval is not required for imposition of a state income tax on Indians. State Tax Commission v. W. L. Barnes, supra.

As this Court noted in Oklahoma Tax Commission v. United States, supra, Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes. When Congress wants to require nontaxability it can, as it has so often done, say so explicitly.

CONCLUSION

From the numerous previous decisions of this and other courts, it is clear that

the test of validity of state action on Indian reservations is:

> Essentially, absent governing acts of Congress, the question has always been whether state action infringed upon the right of reservation Indians to make their own laws and be ruled by them.

On the basis of the many prior decisions cited herein, it is equally clear that no governing act of Congress is involved in this case and this state action does not infringe upon the Indian tribe's right of self-government.

The Supreme Court will decline jurisdiction when the constitutional question is not substantial. Zucht v. King, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 (1922). From the previous decisions cited in this motion, it is apparent that no substantial federal question is involved in this case. Accordingly, the

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> of Congress, the question has al-
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self-government.

The Supreme Court will decline jurisdiction when the constitutional question is not substantial. Wells v. Nine, 289 U.S. 171, 57 L.Ed. 134, 43 S.Ct. 66 (1922). In the previous decisions cited in this writ it is apparent that no substantial federal question is involved in this case. Accordingly

Court should dismiss the appeal or affirm the judgment.

Respectfully submitted,

GARY K. NELSON
The Attorney General
of Arizona

James D. Winter

JAMES D. WINTER
Assistant Attorney General

January, 1972.